NO. 20917

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL ALLAN McCOWAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

JOHN K. VAN de KAMP,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
STEPHEN D. MILLER,
Assistant U. S. Attorney,
Assistant Chief,
Special Prosecutions Division,

827 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

NO. 20917

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL ALLAN McCOWAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

JOHN K. VAN de KAMP,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
STEPHEN D. MILLER,
Assistant U. S. Attorney,
Assistant Chief,
Special Prosecutions Division,

827 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

TOPICAL INDEX

TABLE OF AUTHORITIES

NO. 20917

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL ALLAN McCOWAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

Appellant Michael Allan McCowan appeals from his conviction upon a two count indictment charging him with violations of Title 18, United States Code, Section 1702 (Obstruction of Correspondence), and Section 1708 of Title 18, United States Code (Theft of Mail).

Count One of this indictment charges appellant with having obtained by fraud and deception from the Van Nuys, California Main Post Office a package addressed to Joan Ansel, Colonial Manor Motel, Rockville, Maryland. Count Two charges that

appellant opened the above-addressed package which had theretofore been in the Van Nuys, California Main Post Office before it had been delivered to the addressee with design to obstruct correspondence. Both offenses are alleged to have occurred on October 21, 1964 [R. T. p. 2]. 1/

That indictment which was filed on June 9, 1965 [C. T. p. 2] 2/ will hereinafter be referred to as the second or superseding indictment which was filed in Criminal Case No. 35009-CD.

Prior to the filing of the second indictment, the grand jury had, on January 27, 1965, returned an indictment in criminal case No. 34508-CD, hereinafter referred to as the first indictment [C. T. p. 72], charging appellant in a two count indictment with having violated Title 18, United States Code, Section 1708. Jury trial on that indictment commenced before the Honorable Jesse W. Curtis. On April 9, 1965, Judge Curtis declared a mistrial for the reason that the jury was unable to agree upon a verdict [C. T. p. 74].

Subsequent to the mistrial in connection with the first indictment, the grand jury returned the second indictment.

On November 13, 1965, a jury trial commenced on the second indictment, before the Honorable Charles H. Carr. A verdict of guilty as to both counts was returned by the jury on November 17, 1965 [C. T. p. 81].

On January 24, 1966, Judge Carr sentenced appellant to

1/ R. T. refers to Reporter's Transcript.

2/ C. T. refers to Clerk's Transcript.

five years imprisonment on each of the counts of the indictment, the sentences to begin and run concurrently, and for a study as described in Title 18, United States Code, Sections 4208(b) and (c) [C. T. p. 63].

The United States District Court for the Southern District of California had jurisdiction of this case based upon Title 18, United States Code, Sections 1702, 1708 and 3231. The jurisdiction of this Court is based upon Title 28, United States Code, Sections 1291 and 1294.

II

STATUTES INVOLVED

Title 18, United States Code, Section 1702 provides:

> "Whoever takes any letter, postal card, or package out of any post office or any authorized depository for mail matter, or from any letter or mail carrier, or which has been in any post office or authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence, or to pry into the business or secrets of another, or opens, secretes, embezzles, or destroys the same, shall be fined not more than $2,000 or imprisoned not more than five years, or both."

Section 1708 of Title 18, United States Code provides in pertinent part:

> "Whoever steals, takes, or abstracts, or by fraud or deception obtains, or attempts so to obtain, from or out of any mail, post office, or station thereof, letter box, mail receptacle, or any mail route or other authorized depository for mail matter, or from a letter or mail carrier, any letter, postal card, package, bag or mail, any article or thing contained therein, or secretes, embezzles, or destroys any such letter, postal card, package, bag, or mail, or any article or thing contained therein; . . . . shall be fined not more than $2,000 or imprisoned not more than five years, or both."

III

STATEMENT OF THE CASE

A. Questions Presented

1. Was there sufficient evidence to support the judgment of conviction below and to warrant the Court's denial of appellant's Motion for Judgment of Acquittal?

2. Do the provisions of Title 18, United States Code, Sections 1702 and 1708 extend to the facts of this case?

3. Was Government counsel guilty of prejudicial

misconduct during cross-examination of certain defense witnesses?

4. Were appellant's Constitutional rights violated by reason of a conviction after a jury verdict of guilty based upon a superseding indictment which included modified counts similar to those contained in a prior indictment which resulted in a mistrial after the jury was unable to agree?

B. Statement of Facts

Appellant McCowan, a former officer for the Los Angeles Police Department [R. T. 190] met two sisters, Jean Ortiz and Joan Ansel at the Woodley Inn, a restaurant located in Los Angeles County, California, in about September, 1964 [R. T. p. 24].

Appellant began to date Ortiz, and the two were seeing each other almost daily for some time, usually at Ortiz's apartment [R. T. pp. 26-27].

In early October, 1964, Joan Ansel left California. Prior to leaving, she left three diamond rings (Government's Exhibits 1, 2 and 3) in the possession of appellant [R. T. p. 27]. Thereafter, Ortiz received a telephone call from Ansel, and as a result of that call, Ortiz asked appellant to return the rings to her so that she could send them to Ansel. Appellant took the rings to Jean Ortiz's apartment [R. T. p. 28]. At the time Mr. McCowan returned the rings to Ortiz, both she and appellant wrapped the rings in a black box (Government's Exhibit 4) [R. T. pp. 29-30].

Appellant placed the rings in Government's Exhibit 4 [R. T.

p. 30]. After the package was wrapped, both Mr. McCowan and Ortiz went to the Van Nuys, California Police Station where appellant worked [R. T. p. 31]. Mr. McCowan entered the station, and thereafter returned to tape and place string around Government's Exhibit 4. Appellant insisted on addressing the packages [R. T. p. 31]. Mr. McCowan addressed the package to Joan Ansel in Maryland, but placed his name on it as sender and listed the return address as Post Office Box 2754, which post office box was shared by Ortiz and Ansel. Appellant explained to Ortiz that his having written "McCowan" on Government's Exhibit 4 was accidental [R. T. pp. 31-32].

Appellant and Ortiz then drove in Ortiz's automobile to the Van Nuys Boulevard Post Office Substation. When they arrived there, Mr. McCowan stated that it would be better if the package was mailed at the Main Branch where it would be better handled [R. T. p. 33]. Ortiz then drove appellant to the Main Post Office on Sylvan Street [R. T. pp. 32-33]. Mr. McCowan and Ortiz entered the Main Post Office and Ortiz handed the package containing the rings to the postal clerk [R. T. p. 34]. Appellant and Ortiz then left the post office and drove back to Ortiz's apartment. Shortly thereafter, appellant stated to Ortiz that he had to leave for work, and he departed [R. T. p. 35].

Some time later, Ortiz had a telephone conversation with her sister, and as a result thereof, she filed an inquiry (Government's Exhibit 5) with the Post Office Department on November 17, 1964 [R. T. pp. 37-38].

Before filing that inquiry, Ortiz had a conversation with appellant at which time Mr. McCowan stated that the package containing the rings had probably, because of its size, been lost in the mail [R. T. pp. 39-40].

Ortiz never authorized appellant to take Government's Exhibit 4 from the mail, and, in fact, never had any conversation with appellant with reference to his extracting the package from the mail [R. T. p. 39].

On October 20, 1964, the day before Government's Exhibit 4 was mailed, appellant, dressed in police uniform, entered the Van Nuys, California Post Office and inquired of postal clerk Edward Tully how a package might be withdrawn from the mail. Mr. McCowan stated to Tully that he was working under cover on a case [R. T. p. 91], and that when he returned to the post office, Tully should act as though he did not know appellant [R. T. p. 93]. Tully referred appellant to Assistant Postmaster Garth Gledhill [R. T. p. 91].

Mr. Gledhill also spoke to appellant on October 20th [R. T. p. 98]. Mr. McCowan stated to Gledhill that he was working with the Narcotics Branch of the Police Department and that he believed that two young girls "that he had worked himself in with" were planning to mail a package which it was believed contained narcotics, and he desired to withdraw the package for further investigation [R. T. p. 99]. Mr. McCowan asked if there was a procedure whereby he could withdraw a package from the mail. Mr. Gledhill advised appellant that a package could be withdrawn if proper

identification be shown together with the filing of an appropriate post office form. Appellant further stated to Gledhill that in the near future the package would be mailed, and that he would contact the postmaster as quickly as possible with regard to withdrawing it [R. T. p. 99].

On the following day, October 21, 1964, between 10:30 and noon, appellant returned to the post office with Jean Ortiz, and Ortiz handed Tully a package which was placed in the United States mails [R. T. pp. 34, 92]. Later, that same morning, Mr. Gledhill received a telephone call from appellant at which time Mr. McCowan stated that the package had recently been mailed. Appellant furnished certain information to Gledhill, including his address, and the name of the addressee, Joan Ansel, Colonial Manor Motel, Rockville, Maryland [R. T. pp. 99-100]. Thereafter, Gledhill approached Postal Clerk Tully and obtained the package from him [R. T. p. 101].

Gledhill then prepared Post Office Department Form 1509 - (Sender's Application for Recall of Mail - Government's Exhibit 6), changing appellant's address related to Gledhill by McCowan from a Granada Hills address to Post Office Box 2754 [R. T. pp. 101-102].

Thereafter, appellant again entered the post office, signed Form 1509 and took possession of the package, explaining that he had placed Jean Ortiz's post office box number on the package in error [R. T. p. 103].

Sometime in November, 1964, appellant requested that

John Brayman, a salesman for a Los Angeles jeweler, M. Weinstein, Inc. [R. T. p. 100] appraise three diamond rings (Government Exhibits 1, 2 and 3) [R. T. p. 111]. Appellant stated that he had received the rings from relatives back east and that they were his [R. T. p. 110]. The rings were appraised, and appellant received an appraisal blank (Government's Exhibit 7) from Mr. Brayman [R. T. p. 112].

Approximately three weeks before Christmas, 1964, appellant asked John Brooks Runyan, a paraplegic residing in Sherman Oaks, California [R. T. pp. 116-117] if he would be interested in buying or selling the diamond rings (Government's Exhibits 1, 2, 3) [R. T. pp. 117-118]. Appellant stated to Runyan the he had acquired the rings in a real estate deal [R. T. p. 118], and that he needed money for the reason that he would be away from his employment while preparing for the bar examination [R. T. p. 134]. Appellant displayed to Runyan the appraisal form he had previously received from Mr. Brayman [R. T. p. 121].

In mid-December, Runyan turned over the rings and box containing them to Charles Matheny, a Canoga Park, California jeweler [R. T. p. 140] to have them appraised [R. T. p. 141], the Friday before Christmas [R. T. p. 146]. Matheny sold one of the rings (Government's Exhibit 1) to a customer, William H. Tanzey for $1,100 [R. T. pp. 142-143]. That sum was turned over to Runyan [R. T. p. 143] who gave the money to McCowan [R. T. p. 125. Jean Ortiz received no part of this money [R. T. p. 44].

Appellant McCowan was interviewed by Postal Inspectors

on January 6, 1965 [R. T. p. 152]. During the interview, McCowan claimed that the package taken from the mail contained identification cards - not diamond rings [R. T. p. 158]. At first appellant claimed that he had remailed the identification cards [R. T. p. 158]. Later in the interview, Mr. McCowan stated that perhaps he had not remailed the package, and that he still might have it. Finally, appellant stated that he had thrown away the package containing the identification [R. T. p. 158].

After his arrest, Mr. McCowan stated to Jean Ortiz that he was sorry for having taken the rings and that his purpose was to sell them and give her the money for them [R. T. p. 42]. Mr. McCowan also requested that Ortiz plead the Fifth Amendment in Court [R. T. p. 43].

At the conclusion of the Government's case, appellant took the stand and testified that after having met Joan Ansel and Jean Ortiz [R. T. p. 191] he and Ansel brought the diamond rings, along with other property belonging to Ansel, to a home on Royal Oak Boulevard in Sherman Oaks, California, which appellant had been watching for the owner [R. T. p. 201]. Appellant testified that he removed the diamond rings from the Royal Oak residence to his home, and in so doing, his wife assisted him [R. T. p. 210]. Sometime thereafter, Joan Ansel stated that she was leaving California, and that he did not see her again [R. T. 210].

Shortly thereafter, Jean Ortiz told appellant that Ansel called her and wanted the rings sent to her, and that Ortiz asked appellant to assist her in wrapping the rings [R. T. p. 214].

Mr. McCowan testified that he returned the diamond rings to Ortiz [R. T. p. 216], and that he and Ortiz prepared two packages for mailing: a package containing the diamond rings as well as another package which was approximately the same size as the package containing the diamond rings. Appellant stated that the rings were in a little black box (Government's Exhibit 4) [R. T. p. 217]. Appellant further claims that he placed his name on both packages [R. T. pp. 275-276].

Appellant testified that on October 21st, Ortiz requested that he sell the three diamond rings (Government's Exhibits 1-3). At that time, appellant contended that the box containing the diamond rings was given to him by Ortiz, with her authority to sell the rings and that this box was not mailed [R. T. pp. 218-219].

McCowan contended that he and Ortiz mailed a package, the contents of which he did not know at the time of mailing [R. T. p. 222]. Later appellant returned to the post office and retrieved the mailed package from Gledhill[R. T. pp. 222-223].

After the package was obtained from the post office, appellant stated that he took it to the police station and that he placed the package in his locker and it was not until the following morning that it was taken to the Detective Squad Room [R. T. p. 224]. According to appellant, the package had not been opened when it was brought to the Detectives on October 22,1964 [R. T. 225].

When the package was opened in the Detective Room, and it was discovered that the package contained identification cards, Sergeant Long advised appellant to place the package back in the

mail [R. T. pp. 225-226]. Appellant admits that he did not remail the package containing the identification but destroyed it so that it could not be used in a jail break [R. T. p. 287].

Appellant testified that he had been relaying information concerning the activities of Ansel and Ortiz to officers of the Los Angeles Police Department [R. T. pp. 194-195, 207]. He admitted that at the time he showed the package containing identification to the police officers, he did not mention the other package containing diamond rings or the fact that he had been given the diamond rings to sell by Ortiz [R. T. pp. 284-285]. Appellant further admitted making love to Jean Ortiz during the time he was carrying on this police investigation [R. T. pp. 286-287]. Appellant admits that he kept the $1,100 received by him until the time of his arrest [R. T. p. 293].

Sergeant Patrick Long, a detective for the Los Angeles Police Department, testified that appellant had supplied information which appellant said he thought could lead to the solution of crimes on the West Coast. This information related to Joan Ansel and her husband [R. T. pp. 351, 352]. Long further testified that he told appellant to keep him advised of developments [R. T. p. 352].

Sergeant Long further testified that appellant had brought a box which contained identification to his attention [R. T. pp. 356, 360]. Sergeant Long made notes from the wrapper on this package [R. T. p. 358]. No notation was made of McCowan's name on the wrapper, and if it had appeared on the wrapper, Sergeant Long thought it would have been recorded [R. T. p. 369]. He recalled

no postage stamps on the package [R. T. 368]. Mr. McCowan never told Sergeant Long that he had possession of the diamond rings [R. T. p. 368].

Ten witnesses were called by the defense to testify to the good character of Mr. McCowan regarding truth and honesty: Ira Reiner [R. T. 300], Gerard Vaccaro [R. T. p. 310], Rosemarie Gruenwald [R. T. pp. 312, 313], Earl Osadchey [R. T. p. 335], David Victor Stanton [R. T. p. 337], John E. O'Grady [R. T. p. 346], Patrick H. Long [R. T. p. 366], Pat Kealy [R. T. p. 372], George E. O'Nan [R. T. p. 373], Olive Starkweather [R. T. p. 414].

IV

ARGUMENT

A. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JUDGMENT OF CONVICTION BELOW. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL.

The Ninth Circuit stated the rule which governs the granting of a motion for a judgment of acquittal in Las Vegas Merchant Assn. v. United States, 210 F. 2d 732 (9th Cir. 1954). The court there stated at page 742:

> "The verdict of a jury will be sustained if there is any substantial evidence in the record to support it. In determining whether the evidence is sufficient to support the verdict, we must consider the evidence in the light most favorable to the Government. Glasser v. United States, 1942, 315 U.S. 60, 69, 62 S. Ct. 457, 86 L. Ed. 680; Woodward Laboratories, Inc. v. United States, 9 Cir. 1952, 198 F. 2d 995."

In Schoppel v. United States, 270 F. 2d 413 (4th Cir. 1959), at pp. 415, 416, the court said:

> "We are unable to agree that the Government's evidence was so lacking in weight and substance as to require a directed verdict of acquittal. Assuming

that the guilt of the appellant was arguable, it was for the jury, not the Judge, to resolve the question. This Court has had occasions several times to point out the respective roles of judge and jury in such a situation. Even when in the judge's opinion it is possible for the jury not to be convinced of guilt beyond a reasonable doubt, this does not justify withdrawing the case from the jury's consideration. . . ."

See also:

Remmer v. United States, 205 F. 2d 277 (9th Cir. 1953);

Cape v. United States, 283 F. 2d 430 (9th Cir. 1960);

Bolen v. United States, 303 F. 2d 870 (9th Cir. 1962).

When the above principles are applied to the facts of this case, we find that the following competent evidence was presented at trial:

Appellant, a former policeman, met Jean Ortiz and Joan Ansel in September, 1964 [R. T. p. 24]. He began to date Ortiz and see her almost daily at her apartment [R. T. pp. 26-27].

Prior to leaving California in October, 1964, Joan Ansel had left the three diamond rings in question with appellant [R. T. p. 27].

Thereafter, Mr. McCowan was asked to return the rings to Ortiz so that they could be mailed to Ansel [R. T. p. 28]. Appellant returned the rings and assisted Ortiz in wrapping them in the black box (Government's Exhibit 4) [R. T. pp. 29-33].

Appellant insisted on addressing the package, and in so doing, addressed it to Joan Ansel in Maryland, but placed his name on it as sender explaining to Ortiz that this had been accidental [R. T. pp. 31-32].

Appellant accompanied Ortiz to the main post office on Sylvan Street in Van Nuys, California, where Ortiz handed the package to the postal clerk [R. T. pp. 32-34].

As a result of a telephone conversation with her sister sometime later, Ortiz filed an inquiry with the Post Office Department on November 17, 1964 [R. T. pp. 37-38]. After filing the inquiry, Ortiz spoke to Mr. McCowan, who stated that the package containing the rings had probably been lost in the mail [R. T. pp. 39-40].

On October 20, 1964, the day before the package was mailed, appellant, who was in police uniform, inquired of a postal clerk at the above-mentioned post office as to how a package might be withdrawn [R. T. p. 91]. Mr. McCowan stated to the Assistant Postmaster that he was with the Narcotics Branch of the Police Department and that he believed two young girls were planning to mail narcotics [R. T. p. 99]. Mr. McCowan was told that a package could be withdrawn from the mail by demonstrating proper identification and by the filing of an appropriate post office form [R. T.

pp. 98-99].

On the morning of the following day, Mr. Tully recalled that appellant returned to the Post office with Jean Ortiz and that Ortiz handed Tully a package which was mailed [R. T. pp. 34, 92]. On the same morning, Mr. McCowan telephoned Assistant Postmaster Gledhill and advised that the package had been mailed [R. T. pp. 99-100]. Gledhill prepared Post Office Department Form 1509 from information conveyed to him by appellant and from information contained on the package which Mr. Gledhill obtained from Mr. Tully [R. T. pp. 101-102].

Shortly thereafter, appellant came to the post office, signed Form 1509, and took possession of the package, explaining to Gledhill that he had placed Jean Ortiz's post office box number on the package in error [R. T. p. 103].

Jean Ortiz never authorized appellant to take Government's Exhibit 4 from the mail [R. T. p. 39].

Sometime in November, 1964, at appellant's request, John Brayman, a salesman for a Los Angeles jeweler, appraised the three diamond rings in question [R. T. p. 111]. On this occasion, appellant stated that he had received the rings from relatives back east and that they were his [R. T. p. 110].

Approximately three weeks before Christmas, 1964, appellant inquired of John Brooks Runyan as to whether he would be interested in buying or selling the rings [R. T. pp. 117-118]. Appellant stated to Runyan that he had acquired the rings in a real estate deal [R. T. p. 118], and that he needed money while

preparing for the bar examination [R. T. p. 134].

In mid-December, Runyan turned over the rings and box containing them to Charles Matheny, a Canoga Park jeweler [R. T. p. 140] who sold one of the rings to William H. Tanzey for $1,100. [R. T. pp. 143-144]. That sum was turned over to appellant [R. T. pp. 135, 143]. Jean Ortiz received no part of the money [R. T. p. 44], and appellant admits keeping the money until the time of his arrest [R. T. p. 293].

When interviewed by the postal inspectors in January, 1965, appellant stated that he had taken a package from the mail, but this package contained identification cards - not diamond rings. Mr. McCowan's explanation to the postal inspectors with respect to what was done with the identification cards contradicted itself three times during that interview. Appellant finally stated that he had thrown away the package containing the identification [R. T. p. 158].

Having been arrested, appellant requested Jean Ortiz to plead the Fifth Amendment at trial [R. T. p. 43].

Appellant testified at trial in his own defense. He contended that at the time of mailing, he did not know the contents of the package [R. T. p. 222].

Thereafter, according to appellant, the package was taken by him to the Van Nuys Detective Room, and when it was discovered that the package contained identification, Sergeant Long advised appellant to place the package back in the mail [R. T. pp. 225-226].

The following testimony was elicited from the appellant on

cross-examination with reference to Mr. McCowan's placing his name on Government's Exhibit 4:

"Q. And you wrote your name as sender on Government's Exhibit 4, didn't you?

"A. I believe I did.

"Q. Now, if you knew that that box contained the diamond rings, why would you put your name on as sender?

"A. I put my name on as sender on both packages.

"Q. Yes. Why, if you knew, at the time you wrapped it, that that package contained the diamond rings, why did you put your name on as sender, that box?

"A. On this particular box?

"Q. Yes, sir.

"A. I addressed them both the same.

"THE COURT: Well, he asked you why. Please answer.

"THE WITNESS: Well, I just had been doing everything I just continued to do it. I used my name just --

"Q. BY MR. MILLER: Why?

"A. The only reason that I could give you, Mr. Miller, is that I have been taking over doing these things for these girls all the way and I just

put my name on as sender." [R. T. pp. 275-276].

* * *

"Q. Isn't it a fact that the reason you put your name on that black box is because the day before you had talked to Mr. Gledhill and he told you the only way you could get a box or package out of the mails was that if your name was on it as sender?

"A. No, these packages were wrapped before I talked to Mr. Gledhill, Mr. Miller.

"THE COURT: Not wrapped, but were they addressed and were they marked?

"THE WITNESS: Yes, they were addressed and marked before I talked to Mr. Gledhill.

"THE COURT: You put your name on before you talked to Mr. Gledhill?

"THE WITNESS: Yes, I believe I did.

"THE COURT: Do you remember?

"THE WITNESS: I really don't recall.

"THE COURT: Go ahead.

"Q. BY MR. MILLER: You don't recall when you put your name on that package?

"THE COURT: That is what he said.

"Q. BY MR. MILLER: And you really don't know why you put your name on the package, is that your testimony?

"A. My testimony is what I just testified to.

"THE COURT: No, he is asking you, you really don't know why you put your name on?

"THE WITNESS: No, sir, I don't.

"THE COURT: At this time you can't say why you did it, is that right?

"THE WITNESS: Yes, your honor."

[R. T. pp. 277-278].

During the course of this portion of the cross-examination, it is obvious that appellant realized his mistake in stating that the packages were addressed and marked prior to his discussion with Gledhill, otherwise there would have been no purpose in appellant's having talked to Mr. Gledhill.

In attempting to explain why he did not tell the officers of the Police Department about the fact that there were two packages involved, appellant testified:

"Q. You didn't think that there would be a duty on your part to tell them about the packages containing the diamond rings -- the package containing the diamond rings, and the fact that you were going to try to sell them for this girl?

"A. Duty on my part to tell them that? They had told me to give it back and I had given them back.

"Q. Sir, at the time, after the mailing of the package on the 22nd of October, when you went in to

tell them about the package that had been retrieved from the mail, and you showed them a package with some identification in it, you didn't mention the fact that there were two packages, did you?

"A. There was only one package we were interested in.

"THE COURT: The question was you didn't tell them about the other package?

"THE WITNESS: No, sir. I didn't.

"Q. BY MR. MILLER: Didn't it seem to you important that these officers with whom you were working should know that you were going to try to sell three diamond rings for a girl whose husband you say you helped put in jail?

"A. Well, I didn't know first off if I was going to be able to sell the diamond rings, and secondly, I didn't think it was important because the rings and all the stuff had been checked out, so far as I knew, and it was clear.

"Q. So your testimony is you just didn't think it was important to tell them about the diamond rings, right?

"A. The only thing I was interested in at the time was finding out what was in that package that we didn't know what the contents were." [Exhibit A, R. T. pp. 284-285].

Appellant attempted to explain why he had destroyed the package containing the identification:

"Q. BY MR. MILLER: My question was, I believe, why did you destroy the identification?

"A. I believed that there was to be a jail break and I felt that if they didn't have it they couldn't use it.

"THE COURT: Well, how could they get it if you had it? You didn't have to destroy it?

"THE WITNESS: No, your Honor, I guess I didn't have to destroy it. I just thought that was the best thing to do with it, to destroy it." [Exhibit A, R. T. pp. 286-287].

Mr. McCowan admitted that during this period of time when he was purportedly carrying on a police investigation that he was making love to Jean Ortiz [R. T. p. 292].

Undoubtedly, there was sufficient evidence for the jury to conclude that appellant was guilty beyond all reasonable doubt.

Apparently, Mr. McCowan contends that the Government's witness, Jean Ortiz, was not of good character and that her testimony should not be given great weight. However, the jury had the opportunity to judge the credibility of Ortiz as well as all of the witnesses who testified at trial.

As stated in Schoppel v. United States, supra, at page 416:

". . . it would offend common sense to insist

on the automatic rejection of the testimony of all available eyewitnesses because they are not men of character. It is better to let the witness be heard and trust the practical sagacity of the jurors who have been made fully aware of their informants' shortcomings." (270 F. 2d at 416).

Judging by the above-mentioned standards, there was substantial evidence whereby the jury could conclude that appellant was guilty beyond a reasonable doubt, and the motion for judgment of acquittal was properly denied.

B. THE PROVISIONS OF 18 U. S. C. SECTIONS 1702 AND 1708 EXTEND TO THE FACTS OF THIS CASE.

It is appellant's contention that Sections 1702 and 1708 of Title 18, U. S. C., do not apply to the facts of this case because it is said that the jurisdiction of the United States ceased with respect to the package which was mailed (See Brief of Appellant, p. 47).

However, it is clear that both Sections 1702 and 1708 do contemplate a violation of those sections based upon the instant facts.

In United States v. Eddy, 1 Bliss 227, 25 F. Cas. 15024 (D. C. Ill. 1858) it was held that when a letter is placed in a post-office, it is within the legal custody of the officer or agents of the Government, and while it so continues, the laws of the United

States operate upon it.

The Court of Appeals for the 8th Circuit had occasion to express a similar view in interpreting Section 1702. The court there said:

> "It seems to us, however, that the plain language of the statute discloses a clear intent on the part of Congress to extend federal protection over mail matter from the time it enters the mails until it reaches the addressee or his authorized agent."
>
> Maxwell v. United States (1956), 235 F. 2d 930, 932, cert. den. 352 U. S. 943.

Appellant cites the cases of United States v. Bullington, 170 Fed. 121 (W. D. Alabama, 1908) and United States v. Safford, 66 Fed. 942 (E. D. Missouri 1895), in support of the proposition that Sections 1702 and 1708 are not applicable to this case. In Bullington however, the Postmaster, being the writer and sender of the letter involved, withdrew the letter from the mails, and gave it to the defendant, who secreted or destroyed it instead of sending the letter over to a third party according to the Postmaster's instructions. In Bullington, the defendant became the agent of the Postmaster, after the package had been withdrawn from the mails, and the authority of the Government over the letter ceased with its delivery to the defendant. In Safford, a case dealing with revised Statute 3892, a forerunner of Section 1708, the court simply held that the statute did not extend to the case of a letter stolen from

the desk of the addressee upon which it had been placed by the mail carrier, in the absence of anyone to receive it.

Appellant contends that the package in question was surrendered by the postal authorities "to the writer or his rightful agent" (Brief of Appellant, p. 47). This contention is no doubt made in the hopes that this case will fall within the meaning of the Bullington and Safford doctrines. However, the facts in this case clearly demonstrate that appellant was neither the sender nor the agent for the sender and had indeed obtained the package from the postal authorities by means of fraud and with the intent to obstruct correspondence. Appellant admits that he knew the rings did not belong to him [R. T. p. 271]. It was Jean Ortiz who mailed the package. Appellant did not have authority or permission from her to extract the package from the mail. In fact, it is his contention that his purpose in removing the package from the mail was to investigate a possible narcotics violation on Ortiz's part. It can hardly be said by any stretch of the imagination that he was acting on her behalf or as her agent. Appellant's contention is utterly without merit.

C. GOVERNMENT COUNSEL WAS NOT GUILTY OF PREJUDICIAL MISCONDUCT DURING CROSS EXAMINATION OF DEFENSE WITNESSES.

It is alleged that the Assistant U. S. Attorney prosecuting this case before the District Court was guilty of prejudicial

misconduct during the cross-examination of certain defense witnesses. Three specifications of misconduct are alleged:

(1) It is contended that a question during cross-examination of a character witness regarding past misconduct of appellant was improper.

(2) During cross-examination of the appellant, the Assistant U. S. Attorney inquired concerning the extent of appellant's legal education.

(3) It is contended Government counsel should not have inquired of appellant concerning his intimate relationship with Jean Ortiz.

We must start with the proposition that a full cross-examination of a witness upon the subjects of his examination in chief is the absolute right of the party against whom he is called.

See: Dixon v. United States, 333 F. 2d 348 (5th Cir. 1964);

Quiles v. United States, 344 F. 2d 490 (9th Cir. 1965).

During the direct examination of appellant he was asked about his professional education to which he responded that he had graduated from Southern Western University Law School in January 1964 [R. T. pp. 190-191]. On cross-examination, the Government simply asked appellant how many years of law school experience he had [R. T. p. 281]. The court did not permit the witness to answer and instructed the jury to disregard the question completely [R. T. p. 282]. It is submitted that the Government had a right to

inquire further as to the extent of appellant's legal education once raised by his counsel during direct examination.

Appellant contends that the Government did not have the right to question appellant with respect to his relationship with Jean Ortiz. The following transpired during cross-examination of appellant:

> "Q. Now, during this period of time in September and October when you say you were carrying on this investigation, you were making love to Jean Ortiz during this period of time, weren't you?
>
> "MR. PARSONS: To which I object as incompetent, irrelevant and immaterial.
>
> "MR. MILLER: Your Honor, I think it goes straight to his credibility.
>
> "MR. PARSONS: What difference would it make? It is incompetent, irrelevant and immaterial.
>
> "MR. MILLER: The whole defense is that there is --
>
> "THE COURT: I have heard enough. I will rule. Just one moment.
>
> "I will let him answer the question 'Yes' or 'No'.
>
> "THE WITNESS: Yes, I was." [R. T. p. 292].

In view of the fact that appellant's defense centered around his contention that he was conducting an official police investigation concerning Jean Ortiz and her relatives, it would seem that there

should be no serious question that the Government on cross-examination should be entitled to inquire into appellant's relationship with this principal Government witness, especially where such questioning would cast light on appellant's credibility.

United States v. Provoo, 215 F. 2d 531 (2nd Cir. 1954).

Ira Reiner, together with nine other witnesses, was called on behalf of appellant to testify as to his reputation for truth and honesty in the community [R. T. p. 300]. On cross-examination the Assistant U. S. Attorney inquired of the witness in the following manner:

> "Q. Have you heard that Mr. McCowan passed worthless checks in the sum of $12, 568.00 and that as a result of this it was a major factor in a man losing his business?" [R. T. p. 301].

Upon objection [R. T. p. 301], the court did not permit the answer to the question [R. T. p. 305]. Again, the jury was instructed to disregard the question and give no consideration whatever to it [R. T. p. 306].

Of course, there was authority for the Assistant U. S. Attorney to ask the aforesaid impeaching question of Mr. Reiner, a character witness. In Michelson v. United States (1948), 355 U.S. 469, the Supreme Court said:

> "The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit

and to make himself vulnerable where the law otherwise shields him. The prosecution may pursue the inquiry with contradictory witnesses to show that damaging rumors, whether or not well-grounded, were afloat - for it is not the man that he is, but the name that he has which is put in issue. Another hazard is that his own witness is subject to cross-examination as to the contents and extent of the hearsay on which he bases his conclusions, and he may be required to disclose rumors and reports that are current even if they do not affect his own conclusion. It may test the sufficiency of his knowledge by asking what stories were circulating concerning events, such as one's arrest, about which people normally comment and speculate. Thus, while the law gives a defendant the option to show as a fact that his reputation reflects a life and habit compatible with commission of the offense charged, it subjects his proof to tests of credibility designed to prevent him from profiting by a mere parade of partisans."

Especially, as here, where the question propounded to the witness was founded on a good faith reliance upon information in possession of the prosecuting attorney [R. T. p. 303], there could be no misconduct on the prosecutor's part.

See: United States v. Haskell, 327 F. 2d 281, 284 (2nd Cir. 1964);

Quiles v. United States, supra.

Thereafter, Gerard Vaccaro was called to testify on behalf of appellant and foundation questions with reference to Mr. McCowan's reputation in the community were propounded to him [R. T. p. 309]. At that point, the Assistant U. S. Attorney inquired of the court as follows:

> "Am I to understand that I am to be precluded from going into this area that we discussed before as to all these character witnesses they are going to put on?" [R. T. p. 309].

The court then made it clear to the Assistant U. S. Attorney that the ruling respecting Mr. Reiner would apply to all future character witnesses [R. T. p. 309].

It is submitted that Government counsel had a right to inquire of the court with respect to whether a ruling regarding one witness would necessarily be binding as to all future witnesses. It is to be noted that Government counsel in propounding his question to the court referred to matters which were discussed not within the presence of the jury and did not again ask the impeaching question.

D. APPELLANT'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY REASON OF A CONVICTION AFTER A JURY VERDICT OF GUILTY BASED UPON A SUPERSEDING INDICTMENT WHICH INCLUDED MODIFIED COUNTS SIMILAR TO THOSE CONTAINED IN A PRIOR INDICTMENT WHICH RESULTED IN A MISTRIAL, THE JURY HAVING BEEN UNABLE TO AGREE.

The first indictment brought under Criminal Case No. 34508-CD and filed January 27, 1965 [C. T. p. 72] included two counts, both brought pursuant to Title 18, United States Code, Section 1708:

"COUNT ONE. On or about October 21, 1964, in Los Angeles County, within the Central Division of the Southern District of California, defendant MICHAEL ALLAN McCOWAN, by fraud and deception obtained from the Van Nuys, California Main Post Office a package addressed to Joan Ansel, Colonial Manor Hotel, Rockville, Maryland, said package containing 3 diamond rings." (Emphasis added.)

"COUNT TWO. On or about October 21, 1964, in Los Angeles County, within the Central Division of the Southern District of California, defendant MICHAEL A. McCOWAN, unlawfully had in his possession the contents of a package, which had been stolen from the mail, addressed to Joan Ansel,

Colonial Manor Motel, Rockville, Maryland, said package containing 3 diamond rings, and at said time and place defendant well knew said contents of said package had been stolen." (Emphasis added).

Trial on this indictment resulted in a mistrial the jury having been unable to agree upon a verdict [C. T. p. 74].

Thereafter, on June 9, 1965, a second and superseding indictment was filed [C. T. p. 2]. It was upon this indictment that appellant was convicted [C. T. p. 63]. That indictment was in two counts. Count One was brought pursuant to Title 18, United States Code, Section 1708, and Count Two was brought pursuant to Section 1702 of Title 18. That indictment reads as follows:

"COUNT ONE:

"On or about October 21, 1964, in Los Angeles County, within the Central Division of the Southern District of California, defendant MICHAEL ALLAN McCOWAN, by fraud and deception obtained from the Van Nuys, California Main Post Office a package addressed to Joan Ansel, Colonial Manor Motel, Rockville, Maryland."

"COUNT TWO:

"On or about October 21, 1964, in Los Angeles County, within the Central Division of the Southern District of California, defendant MICHAEL A.

McCOWAN, opened a package addressed to Joan Ansel, Colonial Manor Motel, Rockville, Maryland, with design to obstruct the correspondence of and before being delivered to the addressee, which said package theretofore had been in the Van Nuys, California Main Post Office."

It is to be noted that the second indictment does not allege that the package in question contained three diamond rings. It should be further noted, however, that the Court would not permit the Government to expand its theory of the case, but instructed the jury that it must find that the package containing the rings must have been mailed before appellant could be found guilty. The Government had taken the position at trial that the obstruction and obtaining of any package from the mail with fraud and deception constituted a violation of this statute, appellant's theory of the case having been that there were two packages involved [R. T. pp. 429-430]. Appellant has not shown, and indeed cannot show prejudice to him as a result of having been tried on this superseding indictment.

Appellant, although he does not argue it in his brief, appears to contend that his constitutional rights were violated because he was tried upon a superseding indictment at the second trial which contained different charges from those contained in the first indictment. Appellant relies upon the authorities cited in a motion to dismiss the second indictment [C. T. p. 4].

It is indeed well settled that retrial of an accused after a

mistrial because a jury was unable to agree is not a denial of the constitutional right against double jeopardy.

United States v. Perez, 9 Wheat. 578 (1824);
Downum v. United States, 372 U.S. 734, 735 (1963);
Forsberg v. United States, 351 F.2d 242
(9th Cir. 1965).

Appellant has not cited any authority which contradicts the basic principle that retrial is not violative of an individual's Constitutional rights after a first trial which resulted in a mistrial when the jury failed to agree. The authorities cited in appellant's brief and discussed hereinbelow do not support his contention that under the circumstances here, trial on the second indictment, although it contained essentially the same charge in a somewhat different form than the first indictment, violated his Constitutional rights.

The very case relied on by appellant shows that his double jeopardy contention is invalid. Thus Green v. United States, 355 U.S. 184 (1957) states:

> "[J]eopardy is not regarded as having come to an end so as to bar a second trial in those cases where 'unforseeable circumstances . . . arise during [the first] trial making its completion impossible, such as the failure of a jury to agree on a verdict.' "
> 355 U.S. at 188. (Emphasis added).

This has been the law since at least 1824. In that year the

Supreme Court held that a mistrial resulting from a jury's failure to reach a verdict was no bar to a subsequent trial. United States v. Ball, 163 U.S. 662 (1895). In Ball, two of the defendants had been convicted of murder. The Supreme Court reversed their conviction on the ground that the indictment was invalid and remanded the case with directions to quash the indictment. As in the case at bar a new indictment was then returned. The defendants were again convicted. On appeal, the court flatly rejected their contention that they had been twice placed in jeopardy, stating:

> "[I]t is quite clear that a defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offense of which he had been convicted." 163 U.S. at 672. (Emphasis added).

In Hopt v. Utah, 104 U.S. 631 (1881), 110 U.S. 574 (1884), 114 U.S. 488 (1885), 120 U.S. 430 (1887), the defendant was in fact retried three times following reversals of his convictions for murder. The fourth conviction was finally affirmed by the Court. 120 U.S. 430 (1887).

Green v. United States, supra, in no way supports appellant's present contention. Green was originally indicted both for first degree murder and for second degree murder. The jury found him guilty of second degree murder but its verdict was silent on the charge of first degree murder. The conviction of second degree murder was reversed on appeal. On remand, Green was retried

and convicted for first degree murder under the original indictment. The Supreme Court reversed, holding that the first jury's silence was an implicit acquittal on the charge of first degree murder and he therefore could not be retried on that charge. 355 U.S. at 190-91. In reversing the conviction, the court, as noted above, expressly stated that a person can be retried when a jury has been unable to reach a verdict. 355 U.S. at 188. Thus, appellant's motion is completely devoid of authority to support his position.

Appellant also appears to contend that the Grand Jury cannot amend its first indictment by returning a superseding one. Again, appellant's motion is lacking in authority to support this proposition. Resubmission to the Grand Jury is the accepted - indeed, the only - method by which an indictment can be amended. As stated by the Ninth Circuit in Carney v. United States, 163 F.2d 784, 789 (9th Cir.), cert. den. 332 U.S. 824 (1947):

> "[T]he rule is that no authority exists to amend any part of the body of an indictment without reassembling the grand jury. . . ."

This has been the law since at least 1887, when the Supreme Court held that the grand jury must be reassembled in order to amend an indictment. Ex parte Bain, 121 U.S. 1, 8, 12-13 (1887).

In United States v. Johnson, 123 F.2d 111 (7th Cir. 1941), reversed on other grounds, 319 U.S. 503 (1943), defendants contended, inter alia, that the indictment was invalid because the grand jury had returned an earlier indictment charging some of the same offenses. Defendants argued that once the grand jury had returned

the first indictment its investigatory powers were at an end and it was unauthorized to return the superseding indictment. The court rejected the contention, stating:

> "We see no reason why a Grand Jury is precluded from continuing an investigation after the return of an indictment, and subsequently again indict for the same offense." 123 F. 2d at 119.

Appellant also appears to contend that the indictment should have been dismissed because he testified at the first trial and this testimony may have been used against him at the second trial. Passing the point that even assuming defendant's contention is correct, his remedy was to move to exclude the testimony at trial, we note that defendant's motion cites no authority to support this contention. On the contrary, the authorities appear unanimous that prior testimony of an accused may be used at a subsequent trial. As Judge Mathes stated while discussing this point in United States v. Yates, 107 F. Supp. 408, 411 (S. D. Cal. 1952), reversed on other grounds, 227 F. 2d 844 (9th Cir. 1955):

> "On the other hand, if defendant Yates should not elect again to take the stand, her entire testimony at the first trial might then be read to the jury by the plaintiff, either as admissions by the defendant, 2 Wharton, Criminal Evidence §679 (11th ed. 1935); see Jackson v. State, 1925, 29 Okl. Cr. 429, 234 P. 228, 229; West v. State, 1922, 24 Ariz. 237,

208 P. 412, 416; People v. Thourwald, 1920, 46 Cal. App. 261, 189 P. 124, 126-127; State v. King, 1917, 102 Kans. 155, 169 P. 557, 558; or under the reported-testimony exception to the hearsay rule. See Mattox v. United States, 1895, 156 U.S. 237, 240-244, 15 S.Ct. 337, 39 L.Ed. 409; Smith v. United States, 4 Cir. 1939, 106 F.2d 726, 728; American Law Institute, Model Code of Evidence, Rule 511 (1942).

"The defendant's testimony at the first trial being voluntarily given, no claim of privilege against self-incrimination as to such reported testimony could be raised. Caminetti v. United States, 1917, 242 U.S. 470, 493-495, 37 S.Ct. 192, 61 L.Ed. 442; United States v. Gates, supra, 176 F.2d at page 79; see Johnson v. United States, 1943, 318 U.S. 189, 196, 63 S.Ct. 549, 87 L.Ed. 704; cf. Raffel v. United States, 1926, 271 U.S. 494, 46 S.Ct. 566, 70 L.Ed. 1054." 107 F. Supp. at 411.

Dean Wigmore is in accord with Judge Mathes. 8 Wigmore, Evidence Section 2276, pp. 472-73 (McNaughton rev. ed. 1961). See also United States v. Grunewald, 164 F. Supp. 644 (S.D. N.Y. 1958); Warde v. United States, 158 F.2d 651 (D.C. Cir. 1946); Milton v. United States, 110 F.2d 556, 559-60 (D.C. Cir. 1940).

In Kaplan v. United States, 7 F.2d 594 (2nd Cir. 1925), testimony by two of the defendants at a bankruptcy proceeding was

admitted against them in their criminal trial. Judge Learned Hand disposed of their contention that this was error with his usual succinctness and clarity:

> "[T]heir admissions were competent against them upon the trial of an indictment, as in a civil cause. Had they wished to remain mute, no doubt they might have done so; but, having once consented to speak, any privilege was at an end. We think it unnecessary to elaborate so plain a point." 7 F. 2d at 597.

McCowan's position is as little supported by reason as by the authorities.

Only one further point need be added. Mr. McCowan appears to cite Finnegan v. United States, 204 F. 2d 105 (8th Cir.) (Gardner, C. J.), cert. den. 346 U. S. 821 (1953), for the proposition that the Government must elect between offenses. Finnegan does not stand for the proposition. In affirming a conviction on a multiple-count indictment, the case states the normal rule that if multiple offenses are of the same general character, they may be joined in one indictment and the Government need not elect between counts. 204 F. 2d at 109-110. It should be noted that no request for such an election was made by the appellant during the course of the trial.

It should of course be noted that appellant's prior testimony was used solely for impeachment purposes at the second trial

[R. T. pp. 271-272] and therefore, the contention that his fifth amendment rights were violated are utterly without substance.

CONCLUSION

Appellant Michael Allen McCowan received a fair trial. The record, taken as a whole, points to only one logical conclusion: that of Mr. McCowan's guilt.

It may not be said that appellant's Constitutional rights were violated, nor was he prejudiced by the filing of and trial on the superseding indictment.

The conduct of Government counsel, including his cross-examination of defense witnesses, was not unfair, but was aimed at a search for the truth in a case involving a clever, intelligent, talented police officer who violated the law.

For the reasons stated, the verdict of the jury should not be disturbed, and the judgment below affirmed.

Respectfully submitted,

JOHN K. VAN de KAMP,
United States Attorney,

ROBERT L. BROSIO,
Assistant United States Attorney,
Chief, Criminal Section,

STEPHEN D. MILLER,
Assistant United States Attorney,
Assistant Chief,
Special Prosecutions Division,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Stephen D. Miller

STEPHEN D. MILLER